OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-03 December 17, 2001

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Submissions to the Division of Advice

Regional Directors have long been invested with the authority and discretion to issue unfair labor practice complaints on behalf of the General Counsel and that authority and discretion has been ably exercised over the years. Responsible exercise of discretion includes assuring that the General Counsel is aware of significant issues pending in Regional Offices and is involved in deciding cases that implicate national policy as well as important and emerging issues. In the past, General Counsels have attempted to itemize all such cases and mandate their submission to the Division of Advice. Our experience has shown, however, that such lists cannot definitively identify all matters of importance. Moreover, the existence of a list suggests that if a matter is not included it need not be submitted. Thus, on occasion, matters that clearly implicated national policy have not been submitted simply because they were not specifically itemized on the mandatory submission list.

For these reasons, I have decided against a litany of the issues that you should submit to the Division of Advice; rather, I believe a discussion of general principles regarding what types of matters I want submitted will better guide you in determining whether to submit a matter. Accordingly, what follows is an elaboration of types of matters that should be submitted in five general areas:

In the final analysis, General Counsels must rely on the sound discretion of the Regional Directors to submit matters that require full Washington consideration. The simple fact that a topic is or is not mentioned in this discussion should not determine whether submission is warranted.

Instead, the list of topics is designed to give you a sense of those areas warranting Advice consideration.

If you are in doubt as to whether an issue presented in a case is one I should be involved in deciding, I expect that you will consult with the Division of Advice.

A. **Developing Areas of the Law**

Cases that implicate developing areas of the law should be submitted. Significant Board and Supreme Court decisions like, *Levitz*, 333 NLRB No. 105 (March 29, 2001) and *M.B. Sturgis*, 331 NLRB No. 173 (August 25, 2000) and the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.,* 523 U.S. ___, 121 S. Ct. 1861 (May 29, 2001) are examples.

Similarly, Advice should be consulted when the Board asks for statements of position or supplemental briefs in a case either on its own motion or in response to a remand by a court of appeals.

As issues are addressed in a "guideline" memorandum, of course, they need no longer be submitted. The complexity of some issues, however, may warrant submission on a continuing basis. For example, charges attacking the legality of lawsuits often raise difficult issues under *Bill Johnson's*, warranting submission. Similarly, Beck issues that have not yet been resolved by the Board may warrant submission.

In general, Advice should be involved in developing theories of violation or remedy (including requests for extraordinary remedies), for which there is no extant Board law or for which there are conflicting lines of precedent. And certainly, if a Region's proposed disposition of a case would require overturning Board precedent, the matter should be submitted.

B. **New technology, methods of business organization or union organizing strategies**

As new work arrangements and new technologies emerge, they may raise questions about the application of the Act in new settings. For example, it is more common to see work arrangements in which employees are widely dispersed or have no fixed duty site; some work places have been markedly changed by the use of e-mail, the Internet and other employer-owned electronic communication systems. Such arrangements may affect the traditional interpretations of rights and obligations under the Act. Many employers have implemented mandatory alternative dispute resolution mechanisms for disputes that implicate statutory rights. Such arrangements may raise questions about whether they unlawfully restrict access to the Board or, if applied in an organized unit, whether they are mandatory subjects of bargaining.

Similarly, unions develop new organizing strategies which present questions under various sections of the Act. For example, the increased use of "neutrality" and card-check agreements under which parties may agree to limit their right to express opinions about the campaign and employers may agree to grant non-employee union representatives access to employees on their premises or to lists of names and addresses of employees raise a variety of NLRA questions regarding the negotiation and enforcement of such agreements.

It is essential that the Office of the General Counsel have a coordinated position in shaping the response to these developments. Accordingly, they should be submitted.

C. **Special Prominence or National Interest**

The prominence of certain cases makes it appropriate that Washington be involved in, or at least apprised about the course of, the investigation and decision making. If you have a case that is likely to generate inquiries to my office, you should notify the Division of Advice and consult regarding how it should be handled.

D. **Interregional Impact**

When charges involving a single labor dispute are filed in different Regions, central coordination and decision making is essential. Recent examples include charges against Wal-Mart (OM 00-24) and charges involving videos produced by Projections, Inc. (OM 01-39). Similarly, cases that involve potential conflict between the NLRA and other statutes or treaties (e.g., ERISA, ADA, RICO, LMRDA, ADEA, treaties with Native American tribes or with other countries) have an impact beyond any single Regional Office. Unless an issue is resolved by a specific inter-agency memorandum of understanding, such matters should be submitted to the Division of Advice.

E. **Traditional Advice Clearance**

Matters which have traditionally been submitted to the Division of Advice will continue:

1. Injunction Litigation matters:

- requests for authorization to seek §10(j) relief,
- recommendations regarding §10(j) relief in all cases in which the Region has issued a complaint seeking a Gissel bargaining order,
- request for permission to file a §10(j) petition later than the standard (within 48 hours after authorization),
- requests for authority to seek contempt of a §10(j) or 10(l) order,
- recommendations regarding appeal in §10(j) or 10(l) cases in which a district court denied injunctive relief,
- notice of any Notice of Appeal filed in a §10(j) or 10(l) case

2. EAJA cases in which the Region wishes to pay a claim

3. Requests for subpoena authorizations in cases not covered by prior delegations of subpoena authority:

- requests for an investigative subpoena to identify an employer which placed a blind newspaper advertisement seeking

job applications. See OM 98-65 (August 7, 1998)
- requests to issue investigative subpoenas post-complaint
- requests to issue investigative subpoenas where a serious claim of privilege is likely to be raised (e.g., subpoenas to the press, witnesses whose chosen counsel the Region would exclude from the interview). See GC Memorandum 00-02 (May 1, 2000).

/s/
A.F.R.

cc: NLRBU

Release to the Public

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